No. 04-1434

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Minnesota Public Utilities Commission, and LeRoy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the Commissioners of the Minnesota Public Utilities Commission and not as individuals,

Appellants,

vs.

Vonage Holdings Corp.,

Appellee.

On Appeal from the United States District Court for the District of Minnesota

BRIEF FOR APPELLEE, VONAGE HOLDINGS CORP.

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Minnesota Public Utilities Commission ("PUC") seeks to regulate Vonage Holdings Corp. ("Vonage"), a provider of an Internet-based voice application, as if it were a "telephone company." The PUC's proposed regulations would violate established Federal law pre-empting state regulation of information services. They would also infringe on Congressional regulation of interstate communications services and interstate commerce generally.

Vonage filed a complaint for injunctive relief with the District Court for the District of Minnesota. The District Court granted a permanent injunction barring enforcement of the PUC's order. The PUC appeals and seeks reversal of the injunction.

Because of the federalism concerns raised by the PUC's attempt to regulate interstate services, and its impact on the declared Congressional policy of promoting the unregulated growth of the Internet, the issues in this case are significant and warrant oral argument. Vonage concurs in the PUC's request for 20 minutes of argument per side.

CORPORATE DISCLOSURE STATEMENT

Appellee Vonage Holdings Corp. has no parent corporation. No publicly held company owns 10% or more of Vonage's stock.

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Vonage concurs with the Minnesota PUC's Jurisdictional Statement, except that the PUC omitted Vonage's constitutional Commerce Clause and Due Process claims, which the District Court found unnecessary to address in light of its preemption finding. Those arguments are renewed here.

STATEMENT OF ISSUES

Vonage provides a voice application that enables its customers, who access the service over the Internet, to communicate with one another or with users of the traditional public telephone network. The Minnesota PUC ordered Vonage to stop offering this service in Minnesota, unless and until Vonage complies with state laws regulating telephone companies. The District Court held that the PUC Order was pre-empted by the regulatory scheme enacted in the Telecommunications Act of 1996, and permanently enjoined enforcement of the order. The questions presented on review are:

(1) Is the PUC Order inconsistent with the deregulated market for Internet applications and other information services that Congress desired in enacting the Telecommunications Act? *California v. FCC*, 39 F.3d 919 (9th Cir. 1994); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); 47 U.S.C. §§ 153(20), 153(46), 230.

(2) Should this Court refer the merits of this case to the Federal Communications Commission ("FCC") on grounds of primary jurisdiction; and, if it does so, should it preserve the status quo pending an FCC decision? *I.C.C. v. Chicago, Rock Island and Pacific RR Co.*, 501 F.2d 908, 913 (8th Cir. 1974)

(3) Is the PUC Order pre-empted by the Telecommunications Act and prohibited by the Commerce Clause of the Constitution because it would prevent Vonage from providing services in interstate commerce to Minnesota customers? *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

(4) Did the PUC deprive Vonage of a property interest without due process of law by adopting its order without a hearing and without making findings of fact? *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *New England Tel. & Tel. Co. v. Conversent Communications*, 178 F. Supp.2d 81 (D.R.I. 2001).

STATEMENT OF THE CASE

This is an action to enjoin enforcement of a decision of the Minnesota Public Utility Commission (the "PUC Order") based on federal preemption, Commerce Clause and procedural Due Process grounds.[1] The

[1] The PUC Order is in the addendum to the PUC's brief at A1.

PUC proceedings were initiated by a Minnesota Department of Commerce ("DOC") Complaint brought against Vonage on July 15, 2003.[2] *See* District Court Order 5 (A14). The DOC alleged that Vonage was providing telephone service in Minnesota without the authorization required under State law, and sought "interim relief" in the form of an order directing Vonage to stop soliciting new customers and to file a 911 emergency services plan in advance of a hearing on the merits. *Id.*

Vonage filed an opposition, and on July 24, 2003, the PUC voted to deny the DOC's request for temporary relief, and issued its Order Denying Temporary Relief on August 1, 2003. (SA77.) The PUC ruled that "further record development" was necessary before it could "determine the line between providing telephone services and providing information services," which it viewed as "critical to the question of Commission jurisdiction." (SA80.) As a consequence the PUC found that it could "not conclude that the DOC [wa]s likely to succeed on the merits …." *Id.*

Two weeks later, in an unexplained about-face, the PUC voted to grant the DOC's Complaint. It did so without holding the hearings or taking the additional evidence that had been found necessary two weeks earlier. The PUC Order found that Vonage provides "telephone service" within the

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[2] The DOC's complaint is included in the PUC's Separate Appendix at SA24.

meaning of Minnesota law and ordered Vonage to "fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of this Order." (A9.) The PUC expressly declined to consider whether federal law precludes the imposition of state telephone regulation, finding, erroneously, that such considerations were unnecessary in determining the scope of its jurisdiction. (A8.)

Vonage brought its complaint before the District Court seeking preliminary and permanent injunctive relief on September 23, 2003.[3] On October 16, 2003, the District Court granted the Complaint and permanently enjoined the PUC Order. The District Court found that Vonage's services are "information services" under the Act and, thus, exempt from State common carrier regulation. (A29.) On January 14, 2004, the District Court denied motions to amend the order or for a new trial. (A32.) The PUC appealed on February 13, 2004.

STANDARD OF REVIEW

The PUC is correct that the district court's issuance of a permanent injunction is subject to "abuse of discretion" review, and that questions of

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[3] On September 22, 2003, Vonage petitioned the FCC to pre-empt the PUC Order. (SA89.) Although Vonage timely advised the FCC of the District Court's final order, the Petition is still pending.

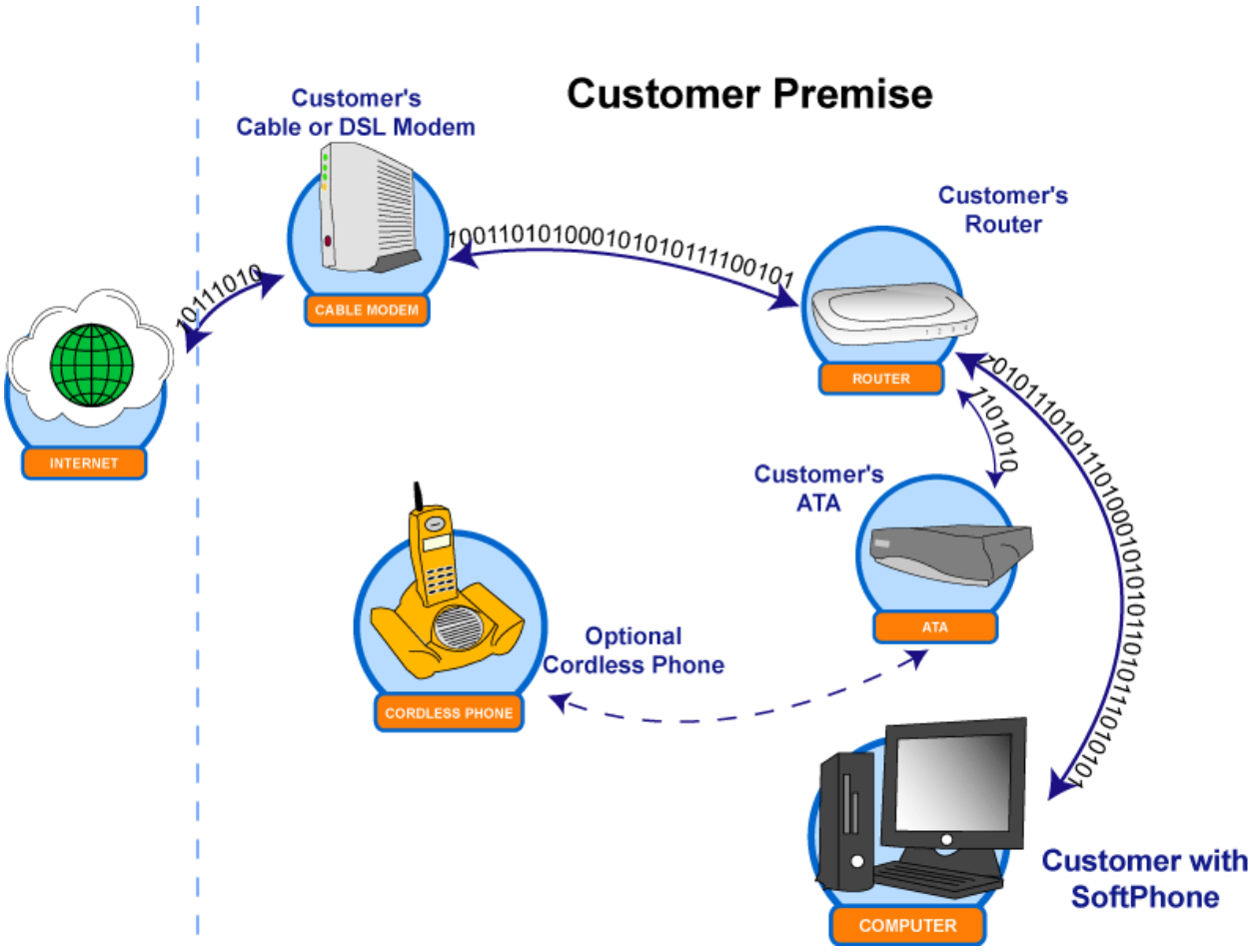
law are reviewed *de novo*. *See* PUC Br. 15. The PUC is wrong, however, that its "factual determinations" should receive deference. As explained above, the PUC did no independent fact-finding, and the record consisted entirely of Vonage's own submissions. The District Court correctly found that there were no disputed material facts. (A11.) The PUC's citation to *Michigan Bell Tel. Co. v. MCI MetroAccess Transmission Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003), is inapposite, as that case involved an arbitration proceeding conducted pursuant to Section 252 of the Communications Act, which expressly delegates an adjudicative function to the state, subject to federal court review. Here, in contrast, the constitutional defects in the PUC Order were raised by Vonage as an original action in the district court, and must be reviewed accordingly.

STATEMENT OF FACTS

1. Vonage's Service.

Vonage's DigitalVoice™ service is an innovative Internet offering that, like e-mail, instant messaging, Internet conferencing, and other emerging services, permits customers to communicate over the Internet. (SA15-16.) Although it resembles traditional telephone service in some respects, it has crucial technical and functional differences.

Unlike traditional telephone service, Vonage customers are not connected to the Public Switched Telephone Network ("PSTN") operated by local telephone companies. Rather, Vonage's service resides and is performed on the Internet. Its customers can only access the service over high-speed Internet connections (also known as "broadband") provided by third-party cable modem, DSL, satellite, and other Internet Service Providers ("ISPs"). (SA16.) Vonage's service is not available to and cannot be accessed by users of "dial-up" Internet access service. Further, Vonage does not provide any broadband Internet access itself – its customers must obtain those connections from others. *Id. Vonage* customers also must install special computer equipment that permits them to place and receive communications over these broadband connections. This equipment, which is owned by the customer, and is not manufactured by or proprietary to Vonage, can be configured in many different ways. Two possible configurations are represented in the figure below (SA16):



In the first configuration, the customer has purchased and installed a router (which is plugged directly into the Internet access modem), and a special-purpose computer (the device labeled "ATA") that converts the Vonage customer's analog voice signals into IP packets for outgoing communication, and converts IP packets to analog voice signals for incoming communication.[4] (SA16-17.) Although a Vonage customer can attach con-

[4] In NARUC's proposed *amicus* brief (which Vonage has opposed as untimely and duplicative), NARUC contends that Vonage customers do not use a computer to access the service. NARUC Amicus Br. at 12. That is

ventional telephone handsets to their ATA, a customer can just as easily use the speakers and microphones installed in their home computers (demonstrated by the second configuration labeled, "Customer with Soft Phone"). In either case, these devices *cannot* be used to access Vonage's service directly. A computer device, either the customer's ATA or the customer's home computer (equipped with suitable software), must be installed and have a broadband connection to the Internet. (SA16-17.)

Vonage customers can communicate with each other over the Internet (just like e-mail or instant messaging), as many do, or they may communicate with plain old telephone service ("POTS") users on the PSTN. *Id.* The PSTN, unlike the Internet, does not use or recognize IP transmissions; instead, PSTN calls are transmitted using end-to-end paths that are reserved for an individual call throughout its duration, using protocols such as Time Division Multiplexing (TDM).[5] Telephones connected to the PSTN cannot receive IP-based calls any more than an 8-track player would know what to do with a DVD. The essence of Vonage's service is to bridge the gap between these two networks by permanently converting information from one transmission format to the other.

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flatly wrong, and is contradicted even by the scant factual findings of the PUC, whom NARUC claims to support. (A8.)

[5] *See, e.g., IP-Enabled Services Notice of Proposed Rulemaking*, Docket No. 04-36, 2004 WL 439260, ¶¶ 9, 16 (rel. March 10, 2004).

For calls from a Vonage customer to an end-user on the PSTN, the IP data packets associated with the Vonage customer's conversation are routed over the Internet to one of Vonage's servers, which Vonage then converts into the TDM format of the PSTN. Vonage then hands off the communication to a traditional long-distance telephone company that establishes the connection with the end-user's telephone on the PSTN and delivers the converted communication. This process works in both directions (albeit with some technical differences), for calls initiated by and calls made to Vonage users. (SA18.)

Vonage also makes it possible for users on the PSTN to dial ordinary 10-digit telephone numbers and "call" Vonage customers on the Internet. Because PSTN users can not dial an Internet IP address, however, Vonage obtains telephone numbers from regulated telephone companies, just like any large corporation or end-user. But rather than being associated with a physical, geographic address on the PSTN, these numbers are associated with computers on the Internet. The PSTN number is matched to the Vonage customer's computer, thereby allowing a PSTN user to communicate with a Vonage user over the Internet. (SA18.)

Because the equipment is smaller than most laptop computers, it is portable, so Vonage customers can use the service to place and receive calls from anywhere in the world that a broadband Internet connection is avail-

able.[6] This flexibility is reflected in Vonage's Minnesota customer base. During the proceedings before the District Court, Vonage estimated that, of its approximately 500 customers with Minnesota billing addresses, 37 did not use a Minnesota telephone number. Vonage also had 88 other customers who use Minnesota telephone numbers but had non-Minnesota billing addresses. (SA19.) (These figures are undoubtedly higher today, in light of Vonage's rapid growth – more than 100% –since September 2003.) In sum, Vonage cannot determine the geographic location of its customers because its service is provided on the Internet. (SA18.)

The Internet data packets that comprise Vonage transmissions are indistinguishable from other Internet traffic, such as those carrying e-mail, chat, instant messaging, or communications to and from servers on the World Wide Web. (SA17.) The communications of Vonage's customers, like packets carrying these other applications' data, are transmitted over facilities provided by others – those who supply the Internet connections, those who maintain the backbone of the Internet and, during communications with PSTN users, the telecommunications carriers who transmit the com-

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[6] *See* John C. Dvorak, "Free Phone Calls," *PC Magazine*, July 2003 (describing how one Vonage customer used the service with a California telephone number while staying at a hotel in New York City). (SA129.)

munication. These are the facilities that transport the communications that Vonage uses to provide its service.

2. The Regulation of Underlying Transport vs. Overlaid Applications.

While voice-over-IP calling is relatively new, the legal framework for regulation of such services is not. A key dichotomy at the heart of federal communications law in general and this case in particular is the distinction between telecommunications and information services. "Telecommunications services" involve the transmission of information without alteration, while "information services" involve both the manipulation and transmission of information. Thus, for example, the local and long-distance voice telephone services offered by traditional LECs, such as Qwest and SBC, are telecommunications services, but Internet or database services (such as LEXIS and Westlaw) that use telecommunications networks to provide value-added services to customers are information services. As their statutory definitions make clear, "information services" are provided via "telecommunications," and utilize the "telecommunications services" offered by "telecommunications carriers."[7]

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[7] "The term telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service" is "the offer-

Telecommunications carriers are subject to common carrier regulation under Title II of the Communications Act of 1934 (the "Act"), 47 U.S.C. §§ 201 *et seq*. *See* U.S. Amicus Br. 3-5. Title II "imposes certain requirements on common carriers," including requiring carriers to provide service on just, reasonable, and nondiscriminatory rates and terms, and to comply with certain tariffing, licensing interconnection, and universal service fund contribution requirements, to name only some of the most prominent. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket 02-361, 2004 WL 856557, ¶ 4 n.16 (rel. April 21, 2004) ("*AT&T Declaratory Order*"). In addition, common carriers providing intrastate services may be subject to various state laws. Information services, on the other hand, are specifically exempt from federal and state common carrier regulation.

This framework assures that providers of communications applications, such as Vonage, have access to the underlying telecommunications infrastructure upon which all such applications rely. The fundamental parameters of this layered policy were set in the FCC's 1980 decision in the

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ing of telecommunications for a fee directly to the public …." 47 U.S.C. § 153(46). Likewise, a "'telecommunications carrier' means any provider of telecommunications services …." 47 U.S.C. § 153(44). "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications …." 47 U.S.C. § 153(20).

Computer II proceeding. *See Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*"). The FCC sought to foster competition and innovation in the market for these "enhanced" data processing applications that rely on open access to common carrier telecommunications facilities, while allowing the telephone monopolies to participate in, but not exercise control over, this market.

The FCC, therefore, established a regulatory regime in which "basic services" – the underlying transport – would remain subject to Title II common carrier regulation, while "enhanced services" would be exempt from such regulation.[8] While the FCC "recognize[d] that some enhanced services may do some of the same things that regulated communications services did in the past," the FCC deemed it unnecessary to subject providers in this competitive market to common carrier regulation. *Computer II,* ¶ 132.

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[8] The FCC defined "basic services" as "the common carrier offering of transmission capacity for the movement of information." *Computer II* ¶ 5. It defined unregulated "enhanced services" as "services, offered *over* common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information …." 47 C.F.R. § 64.702(a) (emphasis supplied).

The FCC focused on "protocol conversion" — the manipulation and transformation of information — as a distinguishing characteristic of enhanced services.[9] *See Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), , 84 F.C.C.2d 50, ¶ 26 (1980) ("*Computer II Reconsideration Order*") ("protocol conversions capabilities are now being offered completely external to the basic transmission network of underlying carriers"); *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, 95 F.C.C.2d 584, ¶ 16 (1983) (clarifying that only "net" protocol conversions, in which information is terminated in a protocol different from the one in which it entered the network, qualify as enhanced services).

Thus, in 1985, the FCC classified as "enhanced" an AT&T offering that converted customers' data received in the asynchronous protocols of the PSTN into the X.25 protocol used by packet-switched networks. *Petitions for Waiver of Section 64.702 of the Commission's Rules,* 100 F.C.C.2d 1057, 1066-1067 (1985) ("*X.25 Conversion Order*") ("when a signal enters the packet network in asynchronous format and exits the network in X.25 format, a net protocol conversion occurs"). Similarly, 10 years later, the FCC recog-

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[9] Protocols are "the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages." *Computer II* ¶ 97 n.33.

nized that AT&T's Interspan frame relay product, which converts data from asynchronous protocols to the X.25 protocol, qualified as an enhanced service. *Independent Data Communications Manufacturers Association, Inc.*, 10 F.C.C.R. 13717, ¶¶ 36, 40 (1995) ("*Frame Relay Order*").[10]

When Congress amended the Communications Act in 1996, it codified the *Computer II* framework into the statute by adopting new definitions of telecommunications and information services that codified the basic-enhanced service framework. Although Congress used slightly different terminology, *compare* notes 7 and 8, *supra*, the FCC has concluded that the categories of "telecommunications service" and "information service" contained in the 1996 Act parallel the definitions of "basic service" and "enhanced service" developed in the FCC's *Computer II* proceeding. *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 F.C.C.R. 21905, ¶ 102 (1997) ("*Non-Accounting Safeguards Order*"); U.S. Amicus Br. 4-5. The FCC has also explained that information and telecommunications services are "mutually exclusive" categories, and that the codification of these terms manifested Congress' intent to maintain a regime in which information service providers are not subject to

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[10] But in keeping with the *Computer II* framework, the FCC required AT&T to "unbundle" the underlying "basic" transmission component of the service and offer it on a stand-alone, common carrier basis. *Id.* ¶¶ 40-46. The PUC's analysis of the case, Br. 34, is thus incomplete.

regulation as common carriers merely because they provide their service "via telecommunications." *Id.* ¶ 103.[11]

The FCC also has found that Congress intended to include protocol conversions within the definition of information services. *Id.* ¶ 104 ("protocol processing services constitute information services under the 1996 Act"). It reasoned that this interpretation was not only "consistent with the Commission's existing practice of treating end-to-end protocol processing services as enhanced services," but also was warranted "in light of Congress's deregulatory intent in enacting the 1996 Act." *Id.; see also Federal-State Joint Board on Universal Service,* Report to Congress, 13 F.C.C.R. 11501, ¶ 51 (1998) ("*Universal Service Report*") ("services offering net protocol conversion appear to fall within the statutory language, because they offer a capability for 'transforming [and] processing' information."); *AT&T Declaratory Order* (clarifying that services that offer net protocol conversion

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[11] The PUC's contention (at 28-30) that the District Court erroneously relied on the earlier regulatory definition of "enhanced services," rather than the statutory definition of "information services," ignores applicable law. The FCC has determined that "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services' under the 1996 Act." *Non-Accounting Safeguards Order* ¶ 102. Indeed, the only difference between the two is that that the definition of information services is *broader* and encompasses services that would not qualify as enhanced. *Id.* ¶ 103.

are information services, ¶¶ 6-7, but service that does *not* perform a net protocol conversion is a telecommunications service, ¶ 12).

Finally, in Section 230 of the Act, Congress established a national "hands-off-the-Internet" policy that courts and agencies at all levels of government have relied upon to advance the Act's deregulatory objectives. Specifically, Congress found that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). In order "to promote th[is] continued development," the 1996 Act reaffirmed the "policy of the United States" of maintaining the Internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

The FCC has viewed the Section 230 as inextricably linked to the codification of the *Computer Inquiry* framework. It has recognized that "there may be telecommunications services that can be provisioned through the Internet," but nonetheless exempted Internet service and application providers from common carriage regulation like that imposed by the PUC. *Universal Service Report* ¶ 101. The FCC specifically found that the 1996 Act mandated that it continue "[l]imiting carrier regulation to those companies that provide the underlying transport," in order to "ensure[] that regulation is minimized and is targeted to markets where full competition has not emerged." *Id.* ¶ 95. "We believe that Congress, by distinguishing 'tele-

communications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach." *Id.* And the courts have recognized that the FCC's views must be accorded *Chevron* deference. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998) (affirming FCC finding that ISPs are not telecommunications common carriers); *Howard v. America Online, Inc.*, 208 F.3d 741, 753 (9th Cir. 2000) (citing, *inter alia,* FCC's *Report to Congress* and interpretation of 47 U.S.C. § 230 for holding that Internet service should be exempt from common carrier regulation).

SUMMARY OF THE ARGUMENT

This case turns on the appropriate legal classification of Vonage's service. In its order below, the District Court found that Vonage's service should be classified as an "information service," rather than a "telecommunications service," as those terms are defined by the Act. It therefore held that the Act and FCC regulations pre-empted the PUC from requiring Vonage to "fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota."

While the PUC challenges the District Court's finding that Vonage provides information services, that finding was the inevitable consequence of the PUC's factual determination that Vonage customers access the service

over the Internet. PUC Order A8. The IP transmission format of the Internet is fundamentally different from that used on the PSTN, and the essence of Vonage's service consists of converting the protocol of the one network into the other (and *vice versa*), thus facilitating the passing of communications between these two otherwise incompatible networks. Such "net protocol conversions" have been classified as enhanced or information services for 25 years, and the District Court had little difficulty applying this established precedent to the facts of this case.

The PUC also challenges, albeit somewhat half-heartedly, the District Court's holding that the 1996 Act and the FCC's decisions pre-empt state regulation of information services as a matter of law. However, the PUC fails to cite, let alone attempt to distinguish, the most relevant cases on which the District Court relied. Instead, the PUC's challenge is focused on the District Court's citation of §230 of the Act, ignoring FCC orders pre-empting state regulation in this area long before Section 230 was enacted. In any case, the District Court correctly identified Section 230 as a policy statement clearly endorsing the FCC's long-standing approach, but did not rely solely on that statute. Also, the PUC's contention that the FCC has never specifically pre-empted state regulation of VoIP services is irrelevant, since Vonage's service is merely a subset of the broader category of en-

hanced/information services, as to which the FCC's pre-emption policy is clear.

In its *amicus* brief advocating a primary jurisdiction referral, the FCC questions the clarity of current law. Its concerns are understandable given that the Ninth Circuit's adherence to *stare decisis* led it recently to reverse an FCC determination that cable modem service is entirely an information service. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). But existing law provides ample clarity on the issues and this case does not raise the *stare decisis* concerns with which the Ninth Circuit grappled.

The PUC's fall-back contention that the District Court went too far by pre-empting the application of the state's 911 regulations mischaracterizes the District Court's injunction. The District Court only pre-empted the PUC Order, which would have subjected Vonage to the *same* 911 regulations that apply to telephone companies (*i.e.*, common carriers). Whether states may enforce laws more specifically tailored to the specialized provision of 911 access by information service providers like Vonage remains to be seen, but is not a subject on which the District Court purported to rule.

The PUC Order is independently invalid because it interferes with jurisdictionally interstate communications and places an impermissible burden on interstate commerce. As an Internet company, Vonage owns no facilities and has no operations on the ground in Minnesota. Vonage does,

however, purchase interstate communications services from carriers regulated by the FCC, as it is entitled to do. While the PUC Order purports to affect only Vonage's "intrastate" service in Minnesota, it would in fact, grossly impair the company's ability to offer *inter*state services both in Minnesota and elsewhere. As a consequence, the PUC Order would impermissibly regulate interstate communications and unconstitutionally impact interstate commerce. Likewise, the PUC's rush to judgment, in which it voted to regulate Vonage just two weeks after announcing that it would not do so, violated Vonage's constitutional right to due process. The PUC's action was taken without providing Vonage constitutionally adequate notice or an opportunity to be heard.

For all these reasons, the District Court's Order should be affirmed.

ARGUMENT

I. The PUC Order Is Pre-Empted By the Communications Act and FCC Regulations.

The Supremacy Clause of Article VI of the Constitution empowers Congress to pre-empt state law through either express, field, or conflict pre-emption. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). Further, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id.* at 369.

The District Court correctly found (1) that Vonage's service is properly classified as an interstate information service, and (2) that federal law precludes the states from imposing telecommunications common carrier regulation on such services. The court, therefore, properly enjoined the PUC Order and should be affirmed.

A. Vonage's Service is an Information Service Under the Statute.

The PUC's contention that Vonage does not actually offer an information service disregards facts that the PUC relied upon in its own decision, and misapplies the controlling law and FCC rulings.

Vonage qualifies as an information service provider for two distinct reasons: first, it provides a protocol conversion service by facilitating communications between the IP format of the Internet and the TDM format of the PSTN. Indeed, distilled to its essence, Vonage's business *is* protocol conversion. Second, Vonage provides access to stored information in the same manner as other Internet services. Finally, none of the exceptions cited by the PUC applies to Vonage's service.

1. Vonage's Service Performs a Net Protocol Conversion.

The PUC argues that Vonage's service does not perform a net protocol conversion because the called party hears a voice sound that is virtually the same as the sound generated by the calling party. PUC Br. 19-22, 32-35. But

the PUC's simplistic theory mischaracterizes Vonage's service. Vonage does not receive voice signals from its customers; it receives a series of digitized IP packets. The PUC ignores the uncontroverted fact that Vonage receives the call in one protocol and converts it to another. Essentially, the PUC is arguing that a protocol conversion is irrelevant if the underlying *content* of the information remains the same. The statutory definition of telecommunications, however, requires transmission without a change of form *or* content.

The PUC's focus on only the latter not only reads the other parts of the definition out of the statute, but was expressly rejected by the FCC in the *Non-Accounting Safeguards Order*. The FCC found that the statutory definition of information service "makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'" *Non-Accounting Safeguards Order* ¶ 104. The FCC explained that content-neutral protocol processing is one of the classes of competitive application service providers that *Computer II* and the 1996 Act intended to shield from common carrier regulation. It therefore concluded that

> an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly "transforms" user information…[and is therefore] information services under the 1996 Act.

Id. This conclusion conformed to the FCC's pre-1996 Act determination that the net protocol test measured a net change "between the point where a customer's data enters the public switched network and the point where it leaves the network." *Frame Relay Order* ¶ 10.[12]

This interpretation of the Act, which is entitled to *Chevron* deference, is dispositive of this case. Vonage's service transforms the format of information between the point at which it is sent "into a network" and the point where it "exit[s] the network." One of those points is where a customer's computer equipment is connected to the Internet; the other is where a user's telephone equipment is connected to the PSTN. For calls originated by Vonage customers, Vonage receives data in IP format,[13] converts the transmission to TDM, and facilitates the call's delivery on the PSTN. Likewise, calls to Vonage customers "enter" the PSTN in TDM, are converted by Vonage to IP, and then delivered to Vonage's customer in that format –

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[12] The entry and exit point of wireline communications networks are defined as the demarcation point at a subscriber's premises; that is, the point of connection between the facilities of the service provider and the terminal equipment used by the customer. *See, e.g.*, 47 C.F.R. § 69.2(cc) (a call "terminates" at the demarcation point); 47 C.F.R. § 68.3 (demarcation point is where the network terminates at a subscriber's premises).

[13] The initial conversion of the customer's voice to IP is performed by the customer's computer, on the customer's side of the demarcation point, not by Vonage. (SA16-17.)

a net protocol conversion that is, inescapably, an information service. Thus, for the same reason that the protocol conversions performed by the services at issue in the 1985 *X.25 Conversion Order* and the 1995 *Frame Relay Order* were considered enhanced services, Vonage's protocol conversion qualifies as an information service.

2. Vonage's Service Accesses and Processes Stored Information.

In addition to "transforming" and "processing" information, Vonage's service includes a capability for "acquiring, storing, … processing, retrieving [and] utilizing … information via telecommunications," in a manner that the FCC has deemed characteristic of information services. For example, when an end-user on the PSTN places a call to a phone number assigned to a Vonage customer, Vonage not only converts the call content into the IP format for transmission on the Internet, but must also identify the IP address associated with the Vonage customer being called, and encode that information onto the Internet data stream. (SA18.) This address identification requires Vonage to access and process stored information.

The FCC has recognized that such computer processing functionality is characteristic of statutory information services. For example, the FCC has explained that the Internet's reliance on Domain Name Systems ("DNS") is one of the "information service" characteristics of the Internet. As the FCC has explained:

> A DNS is an Internet service that enables the translation of domain names into IP addresses. When queried about a domain name, a DNS server provides the querier with the IP address of the domain name or the IP address of another DNS server.… This translation process is necessary because routing of traffic over the Internet is based on IP addresses, not domain names. As a result, before a browser can send a packet to a website, it must obtain the address for the site.

Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 4798, ¶ 17 n.74 (2002) ("*Cable Modem Order*"), *vacated on other grounds*, *Brand X Internet v. FCC, supra*.[14]

The DNS, the FCC explained, "constitutes a general purpose information processing and retrieval capability," *id.* ¶ 37, that "encompasses the capability for 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,'" and thus constitute[s] an information service, as defined in the Act," *id.* ¶ 38 (quoting 47 U.S.C. § 153(20) (statutory definition of information service).

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[14] Although the 9th Circuit vacated the FCC's ruling, it did not undermine the FCC's rationale for classifying Internet access as an information service. Rather, it relied on its earlier decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), which held that the information *transmission* provided by the cable company is distinct from the information *processing* performed by the Internet service provider. That holding has no bearing on the present case, because Vonage itself does not provide any transmission services.

Similarly, in the recent *Pulver Order*,[15] the FCC explained that various database management and information processing functions necessary to and associated with the provision of Pulver's Free World Dial-up service warranted the classification of the service as a statutory information service. *See Pulver Order* ¶ 11. Pulver offers a service that, like Vonage's, facilitates voice communications between users on the Internet. Unlike Vonage, however, Pulver's service is limited to communications on the Internet exclusively, and does not offer a link to the PSTN.

The FCC found that Pulver's service is an information service. Among the "computing capabilities" of the Pulver service the FCC focused on was the "stor[age] [of] member information (*e.g.*, assigned numbers)," and the "process[ing]" of that information on the Pulver server necessary to facilitate communications between users. *Id.*[16] Similar functions are intrinsic to Vonage's service.

Thus, both the *Cable Modem Order* and the *Pulver Order* hold that the routing of information on the Internet necessarily involves an information

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[15] *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 F.C.C.R. 3307 (2004).

[16] The FCC also cited the availability of voice-mail to Pulver users, which the FCC has long classified as an information service, and which Vonage also provides to its customers. *Id.*

processing function that renders the overall service an information service. Similar data processing and routing functions are an intrinsic part of Vonage's service. For the same reasons, Vonage's service must similarly be classified as an information service.

3. Vonage's Service Does Not Trigger Any Exception to the Net Protocol Conversion Test.

The PUC also advances the alternative argument that the protocol conversion performed by Vonage falls into one of the exceptions treating some protocol conversion services as telecommunications services. But the PUC mischaracterizes these exceptions, none of which applies to Vonage's service.

First, the PUC miscasts Vonage's service as "phone-to-phone IP telephony," and quotes the FCC's statement that "protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification … because it results in no net protocol conversion to the end user." PUC Brief 33 (citing *Universal Service Report* ¶ 52).[17] But Vonage's service is not phone-to-phone IP telephony as that term has been used by the FCC. The FCC described phone-to-phone IP telephony as calls that are both originated over a "handset connected to the public switched network" and

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[17] The PUC's reliance on the phone-to-phone IP telephony analysis in the *Universal Service Report* is ironic, in light of the PUC's repudiation of that same report elsewhere in its brief. *See* PUC Br. at 31-32.

and that are likewise terminated "to … [an] ordinary telephone at the receiving end." *Universal Service Report* ¶ 84.

Though Vonage's customers may use an ordinary telephone handset, that telephone is connected to a computer connected to the Internet, not the PSTN. This is not a difference only of semantics—the reason that "phone-to-phone" IP telephony has been treated as a basic service is not because of the use of telephone-style handsets, but because the service is offered by traditional common carriers, using their underlying transport facilities to offer pure transmission with no net change in form or content. Because phone-to-phone IP telephony uses PSTN connections on both ends, every call enters the network in the same format (TDM) as it exits; the carrier temporarily converts the format of the communication, but returns it to the original format before delivery. Thus, phone-to-phone IP telephony does not produce a *net* protocol conversion characteristic of an information service.

The *AT&T Declaratory Order*, issued subsequent to the PUC's Brief, illustrates the distinction between Vonage's service and "phone-to-phone" IP services. AT&T had configured portions of its network so that ordinary PSTN-to-PSTN calls were temporarily converted to IP during the transmission, but then re-converted back to PSTN format before being delivered to the called party. Neither party to the call used the Internet or IP facilities,

used equipment other than that ordinarily used to access the PSTN, nor even had any idea that the call was being carried for part of its distance in IP format. *AT&T Declaratory Order* ¶¶ 11-13. Unlike Vonage's service, which enables customers to use their Internet connection in a manner not otherwise possible, AT&T's service offered no new functionality to users.

The FCC held that AT&T's "phone-to-phone" IP telephony service is a telecommunications service because it originates *and* terminates on the PSTN, uses only ordinary customer premises equipment with no enhanced functionality, and provides no net protocol conversion. *Id.* ¶ 1. Because Vonage's service does not meet any of these three criteria, the *AT&T Declaratory Order* is clearly inapplicable, and further suggests, by negative implication, that Vonage's service is appropriately classified as an information service.

Relatedly, the PUC suggests that a change of form or content is irrelevant unless the change is evident "from the user's standpoint." See PUC Br. 33 (quoting *Report to Congress* ¶ 89 n.188). But the "user's standpoint" was referenced by the FCC only as a means to evaluate phone-to-phone IP telephony at its network end-points. It is immaterial that Vonage's service may seem, superficially, to be similar to an ordinary voice telephone call. The FCC has recognized that "some enhanced services may do some of the same things that regulated communications services did in the past" and

"are not dramatically dissimilar from basic services." *Computer II* ¶¶ 130-132. Consumers could not complete Internet-to-PSTN calls without a net protocol conversion. While most Vonage customers understand that their Internet connection cannot otherwise be used to connect to the PSTN, consumer ignorance of or indifference to a protocol conversion has never been a basis to disregard the statutory framework that regulates information services differently from underlying transport.

Three more exceptions identified by the PUC are easily dismissed because they apply only to services without net protocol conversions. First, the PUC notes that a protocol change performed "between the subscriber and the network for call set-up or call routing" does not on its own convert a basic service to enhanced. PUC Br. 34 (citing *Frame Relay Order* ¶ 14). However, this exception by its terms does not apply to Vonage – Vonage does not merely convert protocols "between the subscriber and the network" but between the subscriber and the other end-point of the transmission. As the FCC explained, this exception merely restates the rule that the protocol conversion test "applies only to end-to-end communications between or among subscribers." *Frame Relay Order* ¶ 14.

Second, the PUC asserts that "where protocol conversion is used merely to facilitate the provision of an overall basic service, the protocol conversion itself constitutes a basic service." PUC Br. 34 (citing *Frame Relay*

Order ¶ 16). This is another restatement of the "net conversion" rule: "conversions taking place solely within the network that result in no net conversion between users should be treated as basic services." *Frame Relay Order* ¶ 16. The exception does not apply to Vonage, because Vonage *does* perform a net conversion between users on the PSTN and users on the Internet.

Third, the PUC urges that information services "do[] not include any use of any such capability for the management, control or operation of a telecommunications network or the management of a telecommunications service." PUC Br. 22. But it fails to explain how Vonage's service could possibly fall into this exclusion. Vonage does not own a "telecommunications network" or provide a "telecommunications service." As demonstrated above, the very purpose of Vonage's service is to perform the necessary protocol conversion to allow consumers to exchange communications between two incompatible networks.

Finally, the PUC suggests that "protocol conversions necessitated by the introduction of new technology are outside the ambit of the enhanced services definition." Br. 34. However, this exception applies "in circumstances involving no change in an existing service" within the telephone network of a single carrier, to maintain compatibility between user equip-

ment and the network.[18] It applies to the use of new technology to modify the means of delivering an existing basic service within a telephone network, not a new offering of a format conversion between two different networks. Vonage's service does not fall within this exception because it has introduced a new service with previously unavailable capabilities.

4. No Other Provision of the Act Bars Classification of Vonage as an Information Service Provider.

The PUC relies on a hodge-podge of statutory citations to contend that, the clear definitions and interpretations cited above notwithstanding, Vonage is not offering an information service. It suggests that Section 274(h)(2)(C) demonstrates a requirement that only a "destination" can be an information service, and that because Vonage's service is not a "destination," it cannot be an information service. As supposed support for this proposition, the PUC notes that Section 228(c)(8)(B) refers to "calls made to an information service from a subscriber's phone line," and that Sections 256(b)(2)(C) and 259(a) refer to "access to information services." *See* PUC Br. 22-23.

Each of these provisions, however, refers to one or more types of information services in a specific context, which the PUC ignores. None sug-

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[18] *See Non-Accounting Safeguards Order,* ¶¶ 2, 16, 29 (1997); *Computer III (Phase II Order),* 2 F.C.C.R. 3072, ¶ 70 (1987).

gests that other information services not mentioned therein should be excluded from the definition despite their qualification under the plain terms of the Act. For example, Section 274 has nothing to do with the definition of information services; it prohibits the Bell Operating Companies (BOCs) that inherited the local service operations after the break-up of AT&T from offering "electronic publishing," except through separate affiliates. The subsection cited by the PUC (at Br. 22) is one of many exceptions to the definition of electronic publishing; but it does not mean that only "electronic publishing" activities are information services.

Section 228(c)(8) governs subscription agreements for billing for information provided via toll-free calls (*e.g.*, 800 numbers). While some information services are accessed in this manner, nothing in this section supports the obviously incorrect conclusion that only services accessed by toll-free calls can be information services.

Section 256(b)(2) authorizes the FCC to participate in the development of technical interconnection standards for the purpose of encouraging the availability of access to public telecommunications networks, services for persons with disabilities, and information services by consumers served by rural telephone carriers. It says nothing about how "information services" should be defined, or about the role of the states. Section 259(a), meanwhile, is a narrow provision that requires incumbent local exchange carri-

ers to negotiate with other carriers for sharing certain facilities for the purpose of providing telecommunications service outside the incumbent carrier's region – service that, like all telecommunications services, can include the provision of access to information services. The FCC's order implementing this provision of the Act does not even discuss information services except insofar as it describes the language of Section 259. *See generally, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, 12 F.C.C.R. 5470 (1997).

Finally, the PUC appears to suggest that Section 230(f)(2) of the Act limits the definition of information services to services that provide or enable access by multiple users to a computer server. PUC Br. 22. As it happens, Vonage's service *does* enable multiple customers to utilize the protocol conversion capability performed by each Vonage Internet server computer. (SA17.) But even if it did not, the PUC's argument would be misplaced. The selected passage quoted by the PUC is part of the definition of "interactive computer service." An interactive computer service undoubtedly is one kind of information service, but there is nothing in the Act to suggest that Congress intended Section 230 to limit the broader category simply by defining the narrower one.

B. The PUC Order Impermissibly Regulates Information Services and the Internet.

The PUC Order flies in the face of the statutory and regulatory determinations that Federal policy requires deregulation of information services. Though the PUC claims that no Federal law pre-empts it, the PUC fails to cite, much less distinguish, the relevant FCC decisions on which the District Court relied. As shown below, the PUC's arguments are mistaken, and the District Court's pre-emption ruling should be affirmed.

When the FCC in *Computer II* concluded that the enhanced services market should be exempt from common carrier regulation to stimulate competition and innovation, it determined that it was necessary to pre-empt the states from undermining that policy by imposing their own forms of common carrier regulation. It found that "the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation." *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 88 F.C.C.2d 512, ¶ 83, n.34 (1981) ("*Computer II Further Reconsideration Order*"). Thus, it expressly "pre-empted the states [from] … impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services." *Id*. The Court of Appeals for the D.C. Circuit upheld this exercise of pre-emptive authority, explaining that "[f]or the federal pro-

gram of deregulation to work, state regulation of … enhanced services had to be circumscribed." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) ("*CCIA*"). Accordingly, the court held that "state regulatory power must yield to the federal." *Id.* at 216.

Subsequent FCC orders have recognized that state regulation of information services, if not pre-empted, would interfere with federal deregulatory policies. *See Computer III Remand Proceedings*, 6 F.C.C.R. 7571, ¶ 121 (1991). These rules have likewise been affirmed by the courts. *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) ("*California III*") (finding that the FCC demonstrated that legitimate "regulatory goals … would be negated" by conflicting state regulation).[19]

Congress and the FCC, through the 1996 Act and implementing orders, have acknowledged that this policy bars common carrier regulation of the Internet. If Internet service could be considered a telecommunications service, States might be "encourage[d] … to impose common-carrier regulation on such providers." *Universal Service Report* ¶ 48 (citing, *e.g.*, *California III*, *supra*). The information service classification precludes that potentially harmful result because it prevents the imposition of disparate "State re-

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[19] While the state retains authority over *purely* intra-state services, the PUC would be unable to demonstrate that Vonage's service is purely intrastate. *See Pulver Order* ¶ 20 n.72 ("we doubt that, with the particular service at issue here, any state could claim FWD to be 'purely intrastate'").

quirements for telecommunications carriers [that] vary from jurisdiction to jurisdiction … includ[ing] certification, tariff filing, and various reporting requirements and fees." *Id.* If such State regulations are permitted, the FCC found, the "result would inhibit growth of these procompetitive services, to the detriment of consumers in the United States and abroad." *Id.*

Here, it cannot be disputed that State regulation of services offered over the Internet has the potential to prevent "efficient utilization and full exploitation of the interstate telecommunications network," *Computer II*, ¶ 7, over which Internet traffic passes. If Vonage is prohibited from offering service in Minnesota, Internet access customers in Minnesota will not have available to them the same wide range of Internet applications as their counterparts in other states. (SA21.) This will affect their usage of, and subscription to, the Internet itself. If one State decides to regulate instant messaging, and another regulates e-mail, the Internet as a whole will become less valuable to customers in other States (and countries) because they will no longer be able to exchange data in any format with any other user. Therefore, State regulation of services offered over the Internet *necessarily* interferes with interstate use of the Internet and with the Federal policy of promoting its use. Accordingly, the PUC's attempt to impose telephone common carrier regulation upon Vonage conflicts with the well established federal policy exempting such services from common carrier regulation.

The PUC's pre-emption argument, oddly enough, does not even cite *Computer II, California III,* or the *CCIA* decision. Instead, it criticizes the District Court's reliance on Section 230 of the Act. (PUC Br. 39-45.) The short answer is that the District Court did not rely *solely* on Section 230. It discussed that section in a single paragraph (at A17), correctly identifying it as an unmistakably clear statement of Congress' intent to leave the Internet unregulated, and noting that the FCC and other courts had cited the provision as *a* basis for forbearing from imposing common carrier regulation on the Internet. (A24-26.) The District Court did not stop there, though, but proceeded to analyze *Computer II* and subsequent FCC and court decisions implementing the 1996 amendments to the Act, as the substantive basis for pre-emption. (A11-26.)[20] Even if Section 230 *by itself* is merely a declaration of Congressional policy, as the PUC argues, it is a policy that is entirely consistent with and supportive of the FCC's past and continuing policies pre-empting regulation of all information services, and that is irreconcil-

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[20] The PUC's focus (at 43-45) on dicta from the lower court's ruling in *Zeran v. America Online, Inc.*, 958 F.Supp. 1124 (E.D.Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), overlooks (1) the holding that §230 preempted the state law tort claim at issue in the case, and (2) that the case had nothing to do with public utility regulation. The FCC's interpretation of §230 as a Congressional policy statement limiting such regulation of Internet services is subject to *Chevron* deference.

able with the PUC's desire to regulate Vonage's offering as a "telephone" service.

The PUC then contends that the District Court erred because the FCC has never issued an order specifically pre-empting state regulation of Voice over Internet Protocol services. (PUC Br. 45-47.) But that is not the standard. The FCC has expressly pre-empted state regulation of enhanced services; the PUC cannot point to any requirement that the agency issue a separate order pre-empting each individual service. The fact that the FCC is now considering its policies towards VoIP in a rulemaking proceeding (which, when completed, will have prospective effect only), likewise has no bearing on the pre-emptive effect of the *current* policies. Indeed, the FCC recently approvingly cited the District Court's Order for the proposition that "[c]ourts have repeatedly recognized" that Congress intended the Internet to remain unregulated and, "as a result, have rejected state attempts to regulate such services." *Pulver Order* ¶ 18 and n.66.

II. The PUC's Emergency Calling Arguments Are Erroneous and Irrelevant.

The PUC argues at length concerning the importance of 911 emergency calling services, the states' traditional authority in the area of public safety, and the "substantial adverse consequences" that might ensue if states had no authority to impose any standards on 911 services. This parade of horri-

bles, however, has little to do with the case before this Court. It is the District Court's injunction that is the subject of this appeal, not the strawman depiction of that injunction advanced by the PUC's lawyers here.

When the District Court pre-empted the PUC Order, it invalidated the requirement that Vonage adhere to the 911 calling requirements applicable to traditional telephone companies, which Vonage is neither technically able nor legally obligated to do. The District Court did not address the potential scope of state and local governmental authority over an information service provider's voluntary attempt to utilize state and local emergency calling resources, and this Court should reject the PUC's attempt to so broadly construe the District Court's decision. *See Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint … [courts] will not reach constitutional questions in advance of necessity of deciding them.").

There are, no doubt, important public policy questions arising from the provision of 911 service by VoIP providers. It is obviously in the public interest for Vonage, and other Internet telephony companies, to provide the best 911 service possible, and Vonage recognizes that cooperation with, and ultimately some oversight by, state and local officials may be necessary to make Internet 911 calling work as well as does the current PSTN 911 sys-

tem. But as important as these questions may be, they are not before the Court in this proceeding.

Moreover, as the plain language of the Act makes clear, whatever authority the PUC has with respect to 911 obligations derives from power conferred on it by the FCC, and the FCC has chosen not to impose emergency calling obligations on VoIP services for the time being. *See* 47 U.S.C. § 251(e)(3) ("The *Commission* and any agency or entity to which the *Commission* has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance.") (emphasis supplied).[21]

The FCC's primary role in setting 911 policy is reflected in recent activity in the FCC's 911 docket. In 2002 the FCC solicited comments on the applicability of 911 to VoIP services. *See* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,

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[21] The FCC's sole jurisdiction over 911 obligations is evident from the legislative history of the 911 Act, which explains that § 251(e)(3) was Congress' response to the patchwork quilt of state emergency response systems in use for wireless telecommunications. *See Implementation of the 911 Act*, Notice of Proposed Rulemaking, 15 F.C.C.R. 17079, ¶ 6 (2000) (citing S. REP. 106-138, 106th Cong. 1st Sess., at 2 (1999) as describing the "lack of consistency" in "emergency wireless numbers" across the U.S.). Congress, therefore, tasked the FCC with implementing a national solution. *Id.*

Further Notice of Proposed Rulemaking, 17 F.C.C.R. 25576, ¶113 (2002) ("*2002 E911 NPRM*"). The subsequent *2003 E911 Order*, 18 FCC Rcd 25340 (2003), imposed no emergency calling obligations on VoIP providers. Undoubtedly, one of the reasons the FCC chose not to act was because it recognized that technology was not yet ready. As the FCC explained:

> The Commission recently received an independent report … [that] identifies potential technical issues that may arise with voice delivered using the Internet Protocol (VoIP) communicating the necessary call-back and location information to PSAPs. We seek comment on the extent to which significant issues exist with regard to the access to 911 and E911 capabilities by consumers using newly developing communications platforms such as IP Telephony, and what, if any, role the Commission should take regarding any such issues.

2002 E911 NPRM ¶ 113 (citations omitted). Nearly all the comments submitted in response[22] advocated against imposing 911 obligations on VoIP.

The FCC's decision to refrain from regulating was in accordance with its long-standing policy of refraining from imposing burdensome 911 obli-

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[22] The PUC's reference to VoIP provider Net2Phone's comments (Br. 54) is difficult to fathom, given that Net2Phone asked the FCC to "reject any implication that the 911 requirements applicable to traditional telecommunications services apply to VoIP providers," and nothing in the FCC's *2003 E911 Order* conflicts with the policy that Net2Phone advocated. *See* Reply Comments of Net2Phone, Inc. at 10 (available at: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513781988).

gations on nascent services. For example, the FCC had for many years declined to impose E911 requirements on mobile satellite phones because such regulation might "impede the development of the service." *E911 Proceeding*, 11 FCC Rcd 18676, 18718 ¶ 83 (1996) ("*1996 E911 Order*").

Notwithstanding that it is under no obligation to do so, Vonage has arranged to provide certain emergency calling services, accessible by dialing the familiar digits "9-1-1," to satisfy customer demand. But Vonage's 911 service is not the same as that offered by traditional telephone companies, who have spent decades developing their service. The most obvious difference stems from Vonage's inability to determine with certainty its customers' geographic location, which makes it impossible for Vonage to be sure that 911 calls are routed to the appropriate public safety answering point ("PSAP"), a limitation that the FCC recognizes and that Vonage discloses to its customers. (SA11, 21.)

The PUC Order, nonetheless, required Vonage to provide the same 911 emergency calling service that traditional telephone companies provide, and cited as the basis for that requirement its view that Vonage is subject to the same regulation as those providers. That was obvious error, as the District Court found. Even assuming, *arguendo*, that the PUC has some authority over VoIP 911 calling, the PUC has not articulated what the basis for

that authority might be, meaning that the matter remains a question for another day.

Thus, most of the PUC's brief on the 911 issue – which attempts to root its authority over Vonage's 911 service in the same soil as its authority over telecommunications carriers generally – is simply irrelevant. Vonage does not provide telephone service, and is, therefore, not subject to telephone regulation. Most of the PUC's arguments, refuted below, are based on this mistake of law and fact.

First, the PUC claims that the term "telephone service" in the 911 Act, 47 U.S.C. § 251(e)(3), encompasses information services. In support, the PUC argues counter-intuitively that because Congress adopted the 911 Act *after* the 1996 Act, the term "telephone service" in the 911 Act was meant to apply to both telecommunications and information services. PUC Br. 58-59.[23] But, given that Congress took pains in 1996 to codify the "mutually exclusive" distinction between telecommunications and information services, it is inconceivable that it would, three years later, without amending either of those definitions, adopt a statutory requirement that was intended to conflate the two. Moreover, Congress has used similar terms elsewhere

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[23] The FCC has acknowledged that the term "telephone service" was not defined by Congress in the 911 Act and is ambiguous. *See Implementation of 911 Act*, 16 F.C.C.R. 22264, ¶ 57 (2001) ("*First 911 Act Order*").

in the Communications Act, directed clearly and only at telecommunications services,[24] which suggests that the term "telephone service" is intended to encompass telecommunications services only. *See State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1111-12 (8th Cir. 1973) (statutory terms must not be read in isolation). Significantly, the PUC cites no instance where a similar term is used to refer to an information service.

The codification of the 911 Act into Title II of the Communications Act provides additional insight. Title II applies to telecommunications common carriers, as its title suggests. If Congress had intended § 251(e)(3), unlike the rest of the title in which it was codified, to apply to information services providers, it surely would have said so explicitly. *See Minnesota Transp. Regulation Bd. v. United States*, 966 F.2d 335, 339 (8th Cir. 1992) (headings may be used to clarify ambiguity).

The PUC's reliance on § 253(b), *see* PUC Br. 51, is likewise mistaken. Because § 253(b) is a modification of the limit on state power to regulate entry into *telecommunications* markets, embodied in § 253(a), it follows that

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[24] *See* 47 U.S.C. § 153(37) (defining "rural telephone company" as a "local exchange carrier" that provides "common carrier service"); 47 U.S.C. § 153(47) (defining "telephone exchange service" to include service "by which a subscriber can originate and terminate a telecommunications service").

§ 253(b) is similarly limited to *telecommunications services*. Because Vonage provides an information service, neither §253(a) nor 253(b) applies.

Similarly inapplicable are the passages from the FCC's *First 911 Act Order*, cited by the PUC at 49-50, which indicate only that state and local officials should play a role in making sure that emergency services are routed to the appropriate PSAP. Nothing in the order suggests that the FCC's 911 rules or the 911 Act apply to information service providers such as Vonage. Nor do the FCC's 911 rules support for the PUC's position. They are all directed at "telecommunications carriers" exclusively, *see* 47 C.F.R. §§ 64.3001, a classification that excludes, by definition, information service providers.

And while the *2003 E911 Order*'s decision to refrain from imposing 911 on VoIP speaks for itself, nothing in the order's finding (at ¶ 50) that states may require Multi Line Telephone Systems ("MLTS") to be E911 compliant suggests that similar obligations can be imposed on information service providers. MLTS equipment is used to interconnect with the PSTN and provide "telephone" service, as the name makes clear. Moreover, the *2003 E911 Order* confirmed that state requirements for MLTS were only proper when "'there is no clear conflict with federal law or frustration of federal policy," *id.* ¶ 56, which precludes the imposition of requirements on information service providers.

III. The Court Should Decline the FCC's Request for a Primary Jurisdiction Referral.

In its Amicus Brief, the United States asks the Court to abstain from deciding this case and to refer the issues presented here to the FCC. Vonage opposes this request. The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experiences of judges" or "falling within the realm of administrative discretion" to an administrative agency with specialized experience and expertise. *Far East Conference v. United States,* 342 U.S. 570, 574 (1952). Primary jurisdiction referrals are utilized "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion …." *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (quoting *Far East*, *supra*). Although primary jurisdiction referrals are sometimes appropriate, such referrals constitute a form of abstention and are disfavored. *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1503 (8th Cir. 1992) ("Abdication of the obligation to decide cases can be justified … only in exceptional circumstances …").

Primary jurisdiction referrals are usually *not* appropriate when the facts are undisputed, and the only contested issues are legal in nature. *See I.C.C. v. Chicago, Rock Island and Pacific RR Co.*, 501 F.2d 908, 913 (8th Cir. 1974) (reversing primary jurisdiction referral by district court because "[t]he only question for resolution is whether there has been an abandonment within

the intendment of § 1(18) [of the Interstate Commerce Act]. *This is a legal question for the courts to determine*.") (emphasis added); *see also TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 74 (2nd Cir. 2002) ("where the facts are undisputed, it will rarely be appropriate to dismiss on the basis of primary jurisdiction") (internal quotation and citation omitted).

Here, a primary jurisdiction referral would only be appropriate if the FCC's expertise was required to determine whether Vonage's service constitutes an information service pursuant to 47 U.S.C. § 153(20). But the facts are undisputed and the law is clear. As a consequence, the FCC's expertise is not required. By facilitating the transmission of communications between end-users on the Internet and the PSTN, Vonage "offer[s] … a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications …." 47 U.S.C. § 153(20). The protocol conversion and Internet processing functions performed by Vonage are, unequivocally, information services under long-standing FCC precedent, as codified by the 1996 Act. *See* District Court Order at 11 (A20) ("[t]he process of transmitting customer calls over the Internet requires Vonage to 'act on' the format and protocol of the information").

The FCC's recent *Pulver* and *AT&T* Orders, both issued within the last three months, confirm that Vonage's service cannot be considered anything

but a statutory information service. While the United States suggests that these decisions are *sui generis* to those service configurations, the FCC is obviously bound by the logic underlying those, and earlier, adjudications. *See, e.g., Kelley v. FERC*, 96 F.3d 1482, 1489 (D.C. Cir. 1996) ("It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent."). If the FCC seeks to change course in an order arising from the *IP Enabled Service* rule-making, those new rules, whatever they are, could be applied prospectively to Vonage (assuming they survive appellate review), regardless of how this Court applies the current policies in this case. As a consequence, the FCC has no reason to fear the *stare decisis* result of an order here.

Moreover, the many policy concerns cited by the United States, PUC and NARUC are not new. They were identified more than 5 years ago by the FCC in its *Universal Service Report* ¶ 91 and n.189 (identifying access charges; customer proprietary network information (CPNI) rules; section 214 authorization requirements for international service; interconnection provisions of section 251(a) (*e.g.*, intercarrier compensation); law enforcement assistance capability requirements; disabled persons access requirements; as well as certain fees, reporting, and filing requirements, as among the Title II common carrier obligations that would be effected by the classi-

fication of VoIP services as information services); *see also id.* at ¶¶ 95-104 (impact on universal service). The FCC has had plenty of time to address these issues, but has not done so.

Finally, referring this matter to the FCC for decision could lead to a very long wait.[25] Vonage filed its petition with the FCC the day before initiating this proceeding. That timing was not accidental, and reflected Vonage's judgment that the FCC *should* have the opportunity to address these questions first. But the matter remains pending at the FCC, while the dispute between the PUC and Vonage before this court remains unresolved. In light of the FCC's failure to state when it will issue an order dispositive of *this* litigation, the Court should decline to refer this matter to the FCC.

If the Court, nonetheless, decides to refer this dispute to the FCC, Vonage endorses the terms advocated by the United States for preserving the *status quo*. The injunction should remain in place until a dispositive FCC order is issued.

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[25] The FCC's record on resolving such referrals from the courts is not good. By way of just one example, the U.S. Court of Appeals for the D.C. Circuit's review of the FCC's *Access Charge Reform Order*, 16 FCCR 9923 (2001), has been on hold for three years. *See AT&T Corp. v. FCC*, Dkt. No. 01-1244 (appeal filed 5/31/2001; motion by FCC to hold case in abeyance granted 1/8/2002).

IV. The Order Impermissibly Regulates a Jurisdictionally Interstate Services and Burdens Interstate Commerce.

Because of the nature of the Internet and Vonage's service, it is technically impossible to apply Minnesota's regulations, purportedly limited to intrastate "calls," without also affecting interstate components of Vonage's service. On traditional telephone networks, it is usually possible to determine the jurisdiction of traffic on a call-by-call basis, because the carrier provides a physical connection to the end user, and therefore can determine where that user is located. The same is not true of Internet traffic. The Internet has no system for determining the geographic location of users, and, thus, Vonage has no accurate way of determining where a particular customer is located at the time the customer places or receives a call. Vonage identifies the computer device the customer uses to access the service (so that it can verify that the user is indeed a customer), but since users easily can plug such devices into any broadband Internet connection anywhere in the world, Vonage does not know where the device and its user are located at any given time. Therefore, it is technically impossible for Vonage to determine whether any particular call on the Internet is intrastate or interstate in nature. (SA21-22.)

This means that Vonage could not comply with the Minnesota PUC's Order regarding "intrastate" services without significantly restricting its provision of jurisdictionally interstate service over interstate facilities, even

assuming *arguendo* that Vonage was providing telecommunications service, as mistakenly argued by the PUC. The Order's impact on interstate communications thus violates both the Commerce Clause of the U.S. Constitution and the Communications Act, and provides an independent ground for affirming the District Court's decision.

A. The PUC Order Is Preempted By The Limits the Communications Act Places On State Regulation of Interstate Communications.

Vonage clearly provides an inseverably mixed interstate/intrastate service, the provision of which would be rendered impossible by disparate state regulations, which must, therefore, be preempted.

The Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Although states retain authority over certain purely intra-state matters, "questions concerning … interstate communications service are to be governed solely by federal law and … the states are precluded from acting in this area." *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968). As the Supreme Court explained in *Louisiana*, preemption occurs "where compliance with both federal and state law is in effect physically impossible …." *Louisiana*, 476 U.S. at 368.

This "inseverability" doctrine applies to Vonage's services because there is no technical means by which Vonage could reliably separate intra-

state from interstate traffic completed for its customers. For example, Vonage cannot assure compliance with the PUC Order by blocking all transmissions originating from and terminating to telephone numbers with Minnesota area codes, because some Vonage customers located in Minnesota use non-Minnesota telephone numbers. Similarly, Vonage cannot assure compliance by preventing its customers with Minnesota mailing addresses from placing calls to or receiving calls from Minnesota telephone numbers, because this would not prevent customers from other states from using the service while visiting Minnesota.[26] (SA21.) And, while neither restriction would prevent all intrastate calls, either one would block some interstate calls (by non-Minnesota customers with Minnesota telephone numbers, or by customers with Minnesota addresses who are traveling out of the state).

Similarly, Vonage is a customer of interstate communications carriers, whose services it procures for connections between its servers and users of the PSTN. The PUC Order overlooks – indeed, makes no acknowledgement of – the fact that all communications from Vonage customers that are terminated on the PSTN in Minnesota are handled by a long distance carrier

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[26] As noted, at the time it filed its Complaint below, Vonage had 38 customers with Minnesota billing addresses who requested non-Minnesota telephone numbers, and 88 customers with non-Minnesota billing addresses who used Minnesota telephone numbers.

that receives the call at a Vonage server out-of-state and pays interstate terminating access to the local exchange carrier pursuant to federal tariff to terminate the call in Minnesota. (SA18.) This hand-off occurs outside Minnesota, and is handled by an interexchange carrier subject to the exclusive jurisdiction of the FCC. Vonage's use of those services falls within the exclusive jurisdiction of the FCC, not the PUC.

Because Vonage cannot, as a practical matter, stop offering intrastate service in Minnesota without also affecting interstate services, the State may not regulate Vonage's service. The FCC has confronted this issue with respect to both telecommunications and information services, and has not hesitated to preempt State regulation where, as a practical matter, it is impossible to separate a jurisdictionally mixed service into interstate and intrastate components.[27] The inseverability doctrine mandates preemption here. Although the PUC Order purports only to require Vonage to cease

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[27] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, 15 F.C.C.R. 22983, ¶ 107 (2000) ("[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority"); *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 F.C.C.R. 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable).

completing intrastate calls in Minnesota, Vonage has demonstrated that it is impossible to do this without also blocking a significant amount of interstate traffic. Indeed, since *any* Vonage customer could, in theory, travel to Minnesota at any time and connect their ATA to a broadband Internet connection, Vonage could never prevent *all* intrastate Minnesota use of its service unless it blocked *all* interstate calls as well.

B. The PUC Order Violates the Commerce Clause.

The Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3, empowers Congress to regulate commerce among the states. It also confines the states' power to burden interstate commerce. *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). The "dormant" Commerce Clause operates in this latter capacity by denying "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Id.*; *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

Under the Commerce Clause, State regulation is *per se* invalid when it has an "extraterritorial reach," that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the State. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793-95 (8th Cir. 1995). The Dormant Commerce Clause also requires the striking of a State's law if the burden it imposes upon interstate com-

merce is "clearly excessive in relation to the putative local benefits." *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *R&M Oil & Supply Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002).

The PUC Order plainly has an extraterritorial reach. Vonage could, for example, discontinue marketing its service in Minnesota altogether, and no longer serve customers with Minnesota billing addresses, but still run afoul of the PUC Order. Vonage cannot prevent an out-of-state customer from operating equipment in Minnesota and placing and receiving calls that the PUC has deemed intrastate. This Court has recognized that "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to certain in-state terms." *Cotto Waxo*, 46 F.3d at 794. Here, the PUC Order not only "requires out-of-state commerce to be conducted according to certain in-state terms," it precludes that commerce altogether. Thus, the PUC Order clearly has a constitutionally impermissible extraterritorial reach.

The PUC Order also has the practical effect of preventing Vonage from offering *interstate* services that originate or terminate in Minnesota. In theory, Vonage could continue to offer a service to Minnesota users that only allowed them to place and receive interstate calls, but in reality there is absolutely no demand for a service that is so limited, apart from the fact that Vonage could not enforce the limitation. No consumer can reasonably be

expected to switch back and forth between using their computer to talk to people in other states, and an ordinary telephone to talk to those in the same state. Both the Fourth and Ninth Circuits have upheld FCC pre-emption of State rules in situations where, even though compliance with two inconsistent jurisdictional regulations was *physically* possible, it was *practically* impossible because it would effectively require consumers to maintain two sets of equipment at home for placing different types of calls. *California v. FCC*, 39 F.3d 919, 929-30 (9th Cir. 1994); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977).

Finally, the burden the PUC Order imposes upon interstate commerce clearly exceeds its putative local benefits, and thus fails the *Pike* balancing test. In fact, the Order itself contains *no* policy rationale or explanation of the benefits that will accrue to Minnesota consumers as a result of the Order's issuance. It is further devoid of any explanation of how any such benefits would be significant compared to the harm to interstate commerce done by the Order. While the PUC's lawyers may advance some arguments in the course of this litigation, they should be seen for what they are: *post-hoc* rationalizations for an otherwise flawed order.

V. The PUC Order Violates Vonage's Due Process Rights.

The PUC's arbitrary decision violated Vonage's Due Process rights. "Due process is a 'flexible concept that varies with the particular situation,'

and its 'fundamental requirement … is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *U.S. v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017-18 (8th Cir. 2002) (quoting *Winegar v. Des Moines Ind. Community Sch. Dist.*, 20 F.3d 895, 899-900 (8th Cir. 1994)). The substantive inadequacy of the PUC's notice, coupled with its unannounced decision to resolve all disputed facts against Vonage, constitutes a due process violation.

Courts in this Circuit employ a "two-step analysis" to evaluate due process claims. *Krentz v. Robertson Fire Protection Dist.*, 228 F.3d 897, 902 (8th Cir. 2000). A party must first demonstrate that it has a constitutionally protected interest in life, liberty or property. *Id.* "[T]he plaintiff must then establish that the state deprived him of that interest without sufficient 'process.'" *Id.*

A. Vonage Has a Protected Interest.

Vonage's property interest in the continued operation of its business – in Minnesota and elsewhere – cannot be disputed. "[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents v. Roth,* 408 U.S. 564, 571-72 (1972). Cognizable property interests "stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *Logan v.*

Zimmerman Brush Co., 455 U.S. 422 (1982). Due process rights vest when "matter[s] of statutory entitlement" are at issue. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

The interest at stake here is no less a statutory entitlement than the right to continued employment at issue in *Roth* or the right to receive welfare benefits addressed in *Goldberg.* The Minnesota courts have recognized, for example, a cognizable property interest in a business license. *See Bird v. Dep't of Pub. Safety*, 375 N.W.2d 36, 42 (Minn. Ct. App. 1985) (finding property interest in automobile dealer's license). The federal government has determined that Internet services should remain unregulated, and Vonage's business is predicated upon this unregulated status. Moreover, Vonage clearly had a "right to use the [PUC]'s adjudicatory procedures." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 , 429 (1982).

B. The PUC's Notice Was Inadequate.

"The Due Process Clause of the Fourteenth Amendment requires that a State, prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action." *Kornblum v. St. Louis County*, 72 F.3d 661, 663 (8th Cir. 1995). Notice sufficient to satisfy the Due Process requirements must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and af-

ford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Further, the notice must 'apprise the affected individual of, *and permit adequate preparation for*, an impending hearing.'" *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)) (emphasis added).

Here, the totality of the circumstances surrounding the PUC proceedings demonstrates the inadequacy of the notice afforded Vonage. On August 1, 2003, the PUC denied the DOC's request for temporary relief. In doing so, it stated that "without further record development the [PUC] is unable and unwilling to make any conclusions on jurisdiction. It follows that the [PUC] cannot conclude that the DOC is likely to succeed on the merits or meet the other statutory standards." (SA80.) The PUC determined the subsequent issues "will be addressed in the regular course of this complaint proceeding." *Id.*

Between August 1 and the hearing on August 13, no additional evidence was submitted. The PUC noticed the hearing (first scheduled for August 14) in two different, but non-conflicting, statements, in which it stated that it would examine (1) the Commission's "jurisdiction over the matter," and (2) whether the "complaint warrant[ed] an expedited or contested case proceeding?" (SA82-85.) On August 5, a mere 8 days before the

meeting,[28] the PUC issued a revised notice stating the agenda as, "How shall the Commission proceed?"[29] None of these notices gave any indication that a determination on the merits was forthcoming. Vonage was, therefore, surprised when the PUC proceeded to a vote on the merits.

The PUC's scheduling orders were, at best, ambiguous, and at worst, misleading. The PUC therefore failed to provide constitutionally adequate notice. "The concept of right to notice is that the right to be heard 'has little reality or worth unless one is informed that the matter is pending.'" *Comm'r of Natural Resources v. Nicollet County Pub. Water/Wetlands Hearings Unit*, 663 N.W.2d 25, 29 (Minn. Ct. App. 2001) (quoting *Mullane v. Centeral Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Commission did not inform Vonage that a determination on the merits was forthcoming, and thus deprived Vonage of its property interests without due process. *Bliek,* 102 F.3d at 1472; *Brandt v. Hickel,* 427 F.2d 53 (9th Cir. 1970) (finding "ambiguous" notice of procedural rights constituted due process violation); *Entergy, Arkansas Inc. v. Nebraska,* 241 F.3d 979, 991 (8th Cir. 2001) (inadequate notice constituted "denial of fundamental procedural fairness").

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[28] Minnesota law itself requires 10 days notice to interested parties before a PUC hearing, unless "exigent circumstances" are found. Minn. R. 7829.2800. The PUC has never stated that "exigent circumstances" required the issuance of the revised notice.

[29] Attached at Vonage Addendum.

C. Vonage Was Not Afforded a "Meaningful Opportunity to be Heard."

Vonage's due process rights include "a full opportunity to meet the charges" filed against it. *Citizens State Bank v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984). "In general, due process requires that a hearing … be provided at a meaningful time, and in a meaningful manner." *Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994). Vonage was not afforded such an opportunity.

Indeed, the Vonage proceedings are virtually indistinguishable from similar proceedings at issue in *New England Telephone and Telegraph Co. v. Conversent Communications*, 178 F. Supp.2d 81 (D.R.I. 2001). In *NETT*, the court considered a due process challenge to a state utility commission hearing held to determine whether certain traffic constituted "local traffic" under an interconnection agreement. The commission ruled against Verizon in a summary proceeding, but the court concluded that the agency ignored "contested facts … [that were] material to the outcome of the case," including issues regarding federal jurisdiction over the matter. *Id.* at 93. The commission's failure to develop a more complete record constituted "clear error" and violated Verizon's due process rights. *Id*. at 94-95. The facts here are nearly identical and compel a similar conclusion.

CONCLUSION

For the foregoing reasons, the Court should affirm the Order of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(A) AND 8th Cir. R. 28A(c)

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B). It contains 13,854 words, as determined by Microsoft Word 2002, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

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